ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

To: The Commission

REPLY COMMENTS OF AMERICATEL CORPORATION

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SUMMARY

In these Reply Comments, AmericaTel requests that the Commission grandfather in the terms and conditions that it recently imposed on the entry of ENTEL-Chile to the U.S. market.

While the Commission should not apply the rules that it adopts in this proceeding to AmericaTel, AmericaTel urges it to reject AT&T's "mirror reciprocity" standard for evaluating effective market access in the context of Section 214 applications, and to employ instead the effective market access standard set forth in the NPRM as one element of its public interest test under Section 214. The Commission should, however, maintain the flexibility to adjust its analysis of effective market access to the many different markets and regulatory regimes that exist in other countries. AmericaTel also asks the Commission to adopt the same effective market access test as an important element of the Section 310(b)(4) public interest analysis applicable to foreign entities that seek to acquire an indirect ownership interest in U.S. radio facilities.

AmericaTel requests that the Commission retain the controlling interest standard for "affiliation" specified in the current rules for purposes of granting Section 214 entry authorizations to foreign carriers that wish to enter the U.S. market. Regardless of that definition, however, the Commission should retain the current definition of "affiliation" that it established in its International Services decision for post-entry regulation. The Commission should reject the proposal of IDB to

modify the Commission's definition of a "facilities-based carrier" for purposes of the regulation of international services.

AmericaTel strongly urges the Commission not to require affiliated facilities-based carriers to file and maintain with the Commission updated lists of the accounting rates that their foreign carrier affiliates have established with all other countries.

The Commission should not closely regulate foreign carrier entry into the U.S. market in the form of resale of switched services, but should continue its current regulation of private lines interconnected to the public switched network, and should adopt a rebuttable presumption that no competitive harm would result from permitting unlimited foreign carrier entry to the U.S. market for non-interconnected private line resale. Finally, the Commission should reject AT&T's proposal to establish cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries.

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REPLY COMMENTS OF AMERICATEL CORPORATION

AmericaTel Corporation ("AmericaTel"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby replies to the comments filed by various parties in the above-captioned proceeding. Those commenters addressing the points raised by AmericaTel in its own comments generally support AmericaTel's positions. In addition, several commenters raise new points with which AmericaTel agrees.

AmericaTel concurs with Telefonica Larga Distancia de Puerto Rico, Inc. ("TLD") that the Commission should not apply its proposed market entry regulations retroactively to foreign carriers to which it has already granted entry to the U.S. market. As the Commission conducted a thorough review of the competitive implications of the entry of Empresa Nacional de Telecomunicaciones, S.A. ("ENTEL-Chile") into the U.S. market just 10 months ago, any revisitation of its decision to authorize

ENTEL-Chile to enter the U.S. market in light of subsequently adopted rules of general applicability would be both unnecessary and unfair to parties that justifiably relied on the permanence of the Commission's determination.[1/]

While the Commission should not apply the rules that it adopts in the instant proceeding to AmericaTel, AmericaTel agrees with the many commenters that support the Commission's tentative decision to reject AT&T's "mirror reciprocity" standard for evaluating effective market access in the context of Section 214 applications. The Commission should use the effective market access standard set forth in the NPRM as one element of its public interest test under Section 214, but should maintain the flexibility to adjust its analysis of effective market access to the many different markets and regulatory regimes that exist in other countries.

AmericaTel also agrees with those commenters that urge the Commission to adopt the same effective market access test as an important element of the Section 310(b)(4) public interest

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1/ AmericaTel is a U.S. facilities-based carrier that is ultimately owned in substantial part by ENTEL-Chile. An affiliate of ENTEL-Chile, ENTEL International B.V.I. Corporation, was authorized to acquire control of AmericaTel ten months ago. See AmericaTel Corporation, 9 FCC Rcd 3993 (1994).

analysis applicable to foreign entities that seek to acquire an indirect ownership interest in U.S. radio facilities. The use of the effective market access test in this context will respond to a perception of Section 310 abroad as an unfair U.S. restriction on international trade, and should thereby encourage foreign nations to remove barriers to the entry of U.S. carriers into their own telecommunications markets.

The disagreement among the commenters as to the appropriate definition of "affiliation" for purposes of granting Section 214 entry authorizations to foreign carriers that wish to enter the U.S. market clearly stems from the essentially arbitrary nature of any definition of "affiliation" other than actual control. For this reason, AmericaTel urges the Commission to retain the controlling-interest level specified in the current rules. If the Commission chooses to employ any non-controlling benchmark level of ownership in defining "affiliation," that level should be at least 25 percent.

Regardless of what definition of "affiliation" the Commission may adopt for purposes of U.S. market entry authorizations, AmericaTel concurs with those commenters that urge the Commission to retain the current definition of "affiliation" that it established in its International Services

decision[2/] for post-entry regulation. No significant problems have been identified as stemming from the Commission's use of the current definition of "affiliation" in the post-entry context, and there is no reason to change that definition merely for the sake of abstract regulatory symmetry.

AmericaTel agrees with those commenters that urge the Commission to reject the proposal of IDB Communications, Inc. ("IDB") to modify the Commission's definition of a "facilities-based carrier" for purposes of the regulation of international services. The Commission is correct that the changes IDB proposes would encourage foreign countries to stop short of creating full facilities-based competition by appearing to legitimize limitations on competition in the resale of leased circuits.

Both U.S. and foreign carriers and foreign governments strongly oppose the Commission's proposal to require that any affiliated facilities-based carrier file and maintain with the Commission an updated list of the accounting rates that its foreign carrier affiliate has established with all other countries. Like AmericaTel, those commenters believe that this

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2/ Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992) ("International Services").

requirement would be pointless, burdensome, and likely to provoke retaliation by foreign nations.

Various commenters support AmericaTel's view that the Commission need not closely regulate foreign carrier entry into the U.S. market in the form of resale of switched services, that the Commission should continue its current regulation of private lines interconnected to the public switched network, and that the Commission should adopt its proposed rebuttable presumption that no competitive harm would result from permitting unlimited foreign carrier entry to the U.S. market for non-interconnected private line resale. The grant of foreign carrier access to the U.S. international resale market presents no significant danger of anticompetitive harm.

Finally, AmericaTel agrees with those commenters that urge the Commission not to adopt AT&T's proposal to establish cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries. It is effective competition, not regulatory intervention, that will establish the proper levels for accounting rates.

I. The Commission Should Grandfather In The Terms And Conditions That It Imposed On The Entry Of ENTEL-Chile Into The U.S. Market.

In its comments, AmericaTel urged the Commission to grandfather in the terms and conditions that it imposed just last year on the entry of ENTEL-Chile to the U.S. market, and to exempt AmericaTel from any regulations developed in the instant proceeding that would impose substantially different conditions on ENTEL-Chile's U.S. market entry.[3/] TLD, whose acquisition by Telefonica de Espana ("Telefonica") was approved by the Commission in 1992,[4/] also asks the Commission to apply any new rules regarding entry to the U.S. market only to new entrants. Like AmericaTel, TLD urges the Commission not to undermine the confidence that foreign-affiliated carriers and their investors have placed in the reliability of the Commission's decisions by applying new rules on U.S. market entry retroactively to previous foreign entrants to that market.[5/] The retention of the terms

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3/ See Comments of AmericaTel Corporation, IB Docket No. 95-22, RM-8355, RM-8392 (April 11, 1995), at 3-5 ("AmericaTel Comments").

4/ See Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, RM-8355, RM-8392 (FCC 95-53), slip op. at ¶ 12 ("NPRM").

5/ See Comments of TLD at 62-63 ("TLD Comments").

and conditions that the Commission placed on the entry of ENTEL-Chile and Telefonica to the U.S. market is all the more reasonable in that they were the genesis of many of the rules that the Commission proposes in the NPRM.[6/]

AT&T states in its comments that the Commission should apply its proposed effective market access test "in a consistent way with no exceptions" in order to prompt foreign governments to open their telecommunications markets to effective competition.[7/] To the extent that AT&T may have intended to seek retroactive application of that test to foreign carriers that have already entered the U.S. market, the Commission should disregard its proposal. AT&T offers no rationale for retroactive application of the effective market access test. Furthermore, AT&T concedes elsewhere in its comments that "[t]he Commission conducted a lengthy and detailed analysis of whether effective opportunities for competition were present in the Chilean telecommunications market in making an affirmative Section 214 public interest finding in AmericaTel Corp[oration]."[8/] In AmericaTel Corporation, the Commission rejected AT&T's petition

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6/ See NPRM, FCC 95-53, slip op. at ¶¶ 12, 13.

7/ Comments of AT&T Corp. at 18 ("AT&T Comments").

8/ Id. at 43.

to deny the applications at issue with full awareness that AT&T had also filed a petition for rule making seeking the kind of market entry standard for foreign carriers that the Commission is contemplating in this proceeding.[9/] The Commission should not second-guess itself now by revisiting that decision.

II. The Commission Should Reject AT&T's "Mirror Reciprocity" Standard For Evaluation Of Section 214 Applications, And Should Employ The More Flexible Standard It Proposes In Evaluating Applications Under That Section And Section 310(b)(4).

AmericaTel agrees with the multitude of commenters that support the Commission's tentative decision to reject AT&T's "mirror reciprocity" standard for evaluating effective market access in the context of Section 214 applications.[10/] AmericaTel supports the Commission's proposed use of the effective market access standard set forth in the NPRM[11/] as

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9/ See AmericaTel Comments at 4-5.

10/ See, e.g., Comments of MCI Telecommunications Corporation at 8 ("MCI Comments"); Letter from P. Michael Nugent, Vice President/Associate General Counsel, Citibank, N.A., to the Honorable Reed E. Hundt, Chairman, FCC (April 11, 1995) (IB Docket No. 95-22), at 1-2 ("Citicorp Comments"); Comments of Fonorola Corporation at 15-16 ("Fonorola Comments"); Comments of Cable & Wireless, Inc. at 3-5 & n.9 ("Cable & Wireless Comments"); Comments of BT North America Inc. at 4-5 ("BT Comments"); Comments of the Directorate General of Posts and Telecommunications (France) at § 3.

11/ See NPRM, FCC 95-53, slip op. at ¶ 40.

one element of its public interest test under Section 214, but urges the Commission to maintain the flexibility to adjust its analysis of effective market access to the many different markets and regulatory regimes that exist in other countries.

AmericaTel also concurs with those commenters that urge the Commission to adopt the same effective market access test as an important element of the Section 310(b)(4) public interest analysis applicable to foreign entities that seek to acquire an indirect ownership interest in U.S. radio facilities.[12/] Where a foreign entity seeks to acquire an indirect ownership interest of more than 25 percent in a common carrier facility, the Commission should find that an important element of the public interest requirement of Section 310(b)(4) has been met if the home market of the foreign entity offers effective market access to U.S. carriers seeking to provide the same type of radio-based services that the subject common carrier facility would provide in the United States. The application of the effective market access test in this context will soften what is now widely seen abroad as an inappropriately rigid limitation on significant

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12/ See, e.g., MCI Comments at 25; AT&T Comments at 38-39; Comments of Loral/Qualcomm Partnership at 7-10; Comments of the National Telecommunications and Information Administration at 19.

foreign investment in U.S. radio facilities,[13] and should thereby encourage foreign nations to reciprocate by removing barriers to the entry of U.S. carriers into their own telecommunications markets.

III. The Commission's Definitions Of "Affiliation" For Purposes Of Foreign Carrier Entry Authorization And Post-Entry Regulation Should Be Based On Control.

There was much disagreement among the commenters as to the appropriate definition of "affiliation" for purposes of granting Section 214 entry authorizations to foreign carriers that wish to enter the U.S. market.[14] AmericaTel submits that

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13/ See Statement of Reed E. Hundt, Chairman, FCC, Before the Subcommittee on Commerce, Trade, and Hazardous Materials, Committee on Commerce, United States House of Representatives, On Section 310 of the Communications Act of 1934 (March 3, 1995) (stating that "foreign governments view Section 310 as closing the U.S. market to their companies. Section 310 has become a metaphor for a closed market. It has become an excuse to go slowly on embracing competition and opening foreign markets to U.S. competitors. I seldom attend an international gathering or bilateral negotiation without hearing the United States criticized for Section 310.")

14/ See, e.g., AT&T Comments at 27 (advocating a 10 percent ownership threshold); Comments of LDDS Communications, Inc. at 9 (urging the Commission to permit foreign carrier investment up to 25 percent without prior authorization); Comments of NYNEX Corporation at 6-7 (proposing that the Commission's effective market access test be triggered when a foreign carrier seeks to acquire a controlling interest exceeding 20 percent in a U.S. international carrier, but that foreign ownership of a non-controlling interest of less (continued...)

the wide range of views on the percentage of foreign ownership that should constitute "affiliation" stems from the essentially arbitrary nature of any definition of "affiliation" other than simple control.[15/] For this reason, AmericaTel urges the Commission to retain the controlling interest level specified in the current rules. If the Commission chooses to employ any non-controlling benchmark level of ownership in defining "affiliation," that level should be at least 25 percent.[16/]

AmericaTel concurs with MCI and Sprint that, regardless of what definition of "affiliation" the Commission may adopt for purposes of U.S. market entry authorizations, it should retain the current, control-based definition of "affiliation" that it established in its International Services decision for post-entry regulation.[17/] AmericaTel believes that this definition

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[14/] (...continued)
than 25 percent in a U.S. international carrier be deemed presumptively in the public interest).

[15/] See Comments of France Telecom at 4 ("France Telecom Comments"); see also Comments of Deutsche Telekom AG at 51-56.

[16/] See AmericaTel Comments at 13.

[17/] See MCI Comments at 15-17; Comments of Sprint at 38-39 ("Sprint Comments"). See also International Services, 7 FCC Rcd at 7333. Under that definition, a U.S. carrier is considered an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common
(continued...)

provides a sufficient safeguard against anticompetitive behavior to achieve the Commission's goals.

Although AT&T advocates that the two definitions of "affiliation" be made symmetrical,[18/] it points to no problems stemming from the Commission's use of the current definition of "affiliation" in the post-entry context. While AT&T's plea for regulatory consistency has an abstract appeal, the cost and administrative inconvenience of such an otherwise purposeless change counsel against it.

IV. The Commission Should Not Modify Its Definition Of A "Facilities-Based Carrier" In The Manner Proposed By IDB.

AmericaTel agrees with those commenters that urge the Commission to reject the proposal of IDB to modify the Commission's definition of a "facilities-based carrier" for purposes of the regulation of international services.[19/] More

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17/ (...continued)
control with a foreign carrier. The Commission uses this definition to classify a U.S. carrier as dominant or nondominant on a particular international route, based on the market power of its foreign affiliate. See NPRM, FCC 95-53, slip op. at ¶ 65.

18/ See AT&T Comments at 45-46.

19/ See, e.g., MCI Comments at 17-18; AT&T Comments at 50-51; Sprint Comments at 39.

specifically, the Commission should not include in its definition of a "facilities-based carrier" a carrier that purchases an ownership or indefeasible right of user interest in a U.S. half-circuit on an international satellite or submarine cable (whether common carrier or non-common carrier), or leases a U.S. half-circuit from Comsat or from a non-common carrier international satellite or submarine cable provider. The Commission is correct that these changes to the subject definition would encourage foreign countries to stop short of creating full facilities-based competition by appearing to legitimize limitations on competition in the resale of leased circuits.[20/]

V. The Commission Should Not Require Affiliated, Facilities-Based Carriers To Submit All Accounting Rates Of Their Foreign Carrier Affiliates.

Most commenters addressing the issue strongly oppose the Commission's proposal to require that any affiliated facilities-based carrier file with the Commission, and update quarterly, "a complete list of the accounting rates that its foreign carrier affiliate maintains with all other

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20/ See NPRM, FCC 95-53, slip op. at ¶ 71.

countries."[21/] Both U.S. and foreign carriers and foreign governments commenting in this proceeding agree that this requirement is onerous, unwarranted, and likely to be regarded by other countries as overly intrusive in areas beyond the Commission's jurisdiction.[22/] Telex-Chile, S.A. ("Telex-Chile") observes that the imposition of new, burdensome and needless regulatory hurdles on carriers from countries such as Chile -- which may have more liberal rules than the United States regarding the entry of foreign carriers into their markets -- would only invite retaliation and a consequent reduction in competition in international telecommunications markets.[23/]

Both AT&T and the SDN Users Association, Inc. ("SDN") assert that the filing of foreign affilates' accounting rates with all other countries will serve to eliminate discrimination against U.S. carriers and reduce accounting rates to cost-based

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21/ NPRM, FCC 95-53, slip op. at ¶ 87.

22/ See, e.g., Sprint Comments at 34; Comments of Telex-Chile, S.A. at 2-3 ("Telex-Chile Comments"); Comments of the British Government at ¶¶ 12-13 ("British Government Comments"); France Telecom Comments at 25-26; Cable & Wireless Comments at 12-13.

23/ See Telex-Chile Comments at 3.

levels.[24/] AT&T would also have the Commission require foreign-affiliated carriers to file their allocation formulas "and other information that would provide competing U.S. carriers with improved information on how their share of return traffic is determined."[25/]

AmericaTel agrees with the British Government that it is competition, not the disclosure of commercially confidential information, that will ultimately eliminate any above-cost accounting rates.[26/] As unaffiliated U.S. carriers would apparently not be subject to the accounting rate filing requirements proposed in the NPRM or the additional requirements suggested by AT&T, those requirements could only jeopardize the growth of effective international competition by unfairly disadvantaging foreign carriers with respect to U.S. carriers.[27/]

24/ See AT&T Comments at 48; Comments of SDN Users Association, Inc. at 1.

25/ AT&T Comments at 47-48.

26/ See British Government Comments at ¶¶ 12-13.

27/ See France Telecom Comments at n.30.

VI. The Commission Should Leave Its Policies On International Resale Of Switched Services And Private Lines Largely Unchanged.

AmericaTel supports Sprint's view that "there is no need to closely regulate foreign carrier entry in the U.S. market in the form of resale of switched services or simple private lines . . . ."[28/] and that "the Commission should continue its current regulation of private lines interconnected to the public switched network . . . ."[29/] AmericaTel also agrees with MCI Telecommunications Corporation ("MCI") that the Commission should adopt its proposed rebuttable presumption that no competitive harm would result from permitting unlimited foreign carrier entry to the U.S. market for non-interconnected private line resale.[30/]

28/ Sprint Comments at 39. AmericaTel therefore urges the Commission to adopt its proposed presumption that "there is no competitive harm in permitting unlimited foreign-carrier entry for switched resale, even to affiliated countries." NPRM, FCC 95-53, slip op. at ¶ 74; see AmericaTel Comments at 6.

29/ Sprint Comments at 39-40. See also Citicorp Comments at 3-4 (supporting the Commission's finding in ¶ 77 of the NPRM that its International Resale Policy decision is "sufficient to ensure that a foreign monopoly carrier would be unable to exploit its market power with respect to its provision of interconnected private line services").

30/ See MCI Comments at 19.

The Commission should not be swayed by the comments of those parties that urge it to apply its proposed equivalent market access standard to international resale carriers, or to subject all such carriers to dominant carrier scrutiny.[31/] The Commission is correct that the danger of anticompetitive harm to the global market is negligible when foreign carriers are granted access to the U.S. international resale market.[32/] The proof lies in the Commission's own finding that vigorous and effective competition already exists among international resellers.[33/] As such competition is the very goal of the Commission's NPRM,

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31/ See, e.g., Comments of GTE at 5-8. As AmericaTel stated in the AmericaTel Comments, it does not object to the harmonization of the "equivalency" standard -- which currently applies to applications to resell private lines to provide switched services -- with the Commission's proposed equivalent market access standard. See AmericaTel Comments at 7. AT&T and MCI both urge the Commission to make these two standards consistent. See AT&T Comments at 49-50; MCI Comments at 20. For the same reasons set forth in Section I above, however, the Commission must not re-open any equivalency determinations that were previously made or requested prior to the effective date of the new rules, nor should it delay or defer the processing of such requests pending the effectiveness of the rules. See AmericaTel Comments at 7. In addition, AmericaTel agrees with Sprint that, once a carrier has obtained a Section 214 authorization to provide switched services via resold private lines, it should be permitted to add any countries for which an "equivalency" finding has been made without further authorization or notification. See Sprint Comments at 40.

32/ NPRM, FCC 95-53, slip op. at ¶¶ 72-73.

33/ Id. at ¶ 73.

any new regulatory intervention by the Commission in the international resale market would be pointless.[34/]

Lastly, AmericaTel agrees with Fonorola Corporation and BT North America Inc. ("BT") that the Commission should not adopt AT&T's ill-conceived plan to establish cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries.[35/] BT is correct that AT&T has confused means with ends, and that effective competition, not regulatory intervention, will establish the proper levels for accounting rates.[36/]

34/ AmericaTel also urges the Commission to reject AT&T's suggestion that the Commission initiate a second rulemaking phase to consider application of the equivalent market access test to resale entry in the event that any analysis required to so extend the test would delay the Commission's adoption of the test with respect to international facilities-based carriers. See AT&T Comments at 24-25. The Commission already has adequate information with which to adopt the proposals in the NPRM regarding international resale, and should not allow AT&T to use the Commission's processes further to harass international resale carriers.

35/ See BT Comments at 5-7; Fonorola Comments at n.25.

36/ BT Comments at 5. AmericaTel takes issue with AT&T's unsupported claim, in the context of its discussion of cost-based accounting rates, that Chilean accounting rate levels are above cost. See AT&T Comments at nn. 5, 35. As AT&T itself admits, competition among the numerous facilities-based carriers in Chile is fierce. See id. at n.5. Furthermore, the Commission found just 10 months ago that:

(continued...)

VII. Conclusion

For the reasons stated above and in the AmericaTel Comments, AmericaTel urges the Commission to reaffirm the analysis made and conclusions rendered in the AmericaTel

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36/ (...continued)

> there are no relevant legal restrictions on the ability of U.S. and other foreign entities to invest in the Chilean international long distance telecommunications marketplace or to obtain licenses to operate as international facilities-based long distance carriers. In addition, we do not find any provisions in Chile's laws or regulations that give Chilean-owned carriers preferential treatment vis-a-vis U.S. or foreign-owned telecommunication companies.

AmericaTel Corporation, 9 FCC Rcd at 3999 (citation omitted). It therefore unclear on what grounds AT&T bases its assertion.

Corporation decision, and to take the other steps that AmericaTel recommends with respect to the promotion and protection of the competitiveness of U.S. carriers in the global marketplace.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher A. Robles, hereby certify that a true and correct copy of the foregoing "Reply Comments of AmericaTel Corporation" was mailed, first-class postage prepaid, this 12th day of May, 1995 to the following:

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